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Goodwill Division Sdn Bhd v Low Peir Yin & Anor

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HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO JA-12BNCVC-10–04 OF 2018
CHOO KAH SING J
6 JANUARY 2019

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Contract — Claims — Claim for commission — Employment contract — Appointment as sale and marketing executive — Outstanding commission — Whether plaintiffs acted or held themselves to defendant as ready to act for commission as its agent — Whether plaintiffs provided professional advice or rendered services as estate agent to defendant — Whether plaintiff fell within meaning of estate agent — Whether there was oral agreement between plaintiffs and defendant for commission to be paid for houses sold in addition to basic monthly salary — Valuers, Appraisers and Estate Agents Act 1981 s 22C

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This was an appeal filed by the defendant against the decision of the sessions court judge ('the SCJ') allowing the plaintiffs' claims. The defendant was a property development company. The defendant offered the plaintiffs employment as sale and marketing executive in the defendant company. The plaintiffs averred that there was an oral agreement entered into between the plaintiffs and the defendant's representative. The oral agreement was that the plaintiffs would be paid a commission for the houses they sold in addition to their basic monthly salary. In the course of their employment, the plaintiffs sold many units of the houses in a project known as D' Carlton Seaview Residences ('the project'). The plaintiffs claimed against the defendant for, inter alia, outstanding commission earned in the sales of the defendant's houses in the project. The defendant contended that the plaintiffs were not entitled to be paid any commission for selling the houses in the project because the plaintiffs were not registered estate agents pursuant to the Valuers, Appraisers and Estate Agents Act 1981 in force at the material time ('the Principal Act'). The defendant further contended that if the defendant had to pay commission for the houses sold, it was only liable to make the payment to a party licensed as an estate agent under the Principal Act, not the plaintiffs. The defendant also contended that the plaintiffs were employees of the company, and that they were bound by the terms of the employment contract, which meant the plaintiffs were entitled only to their basic salary. The defendant also vehemently denied that there was any oral contract entered into between the plaintiffs and defendant. The defendant counterclaimed for all the money paid as commission to the plaintiffs during the subsistence of the plaintiffs' employment. The SCJ allowed the plaintiffs' claim and hence this appeal.

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Held, dismissing the appeal:

(1) There was not a shred of evidence to suggest that the plaintiffs had acted or held themselves out as ready to act for a commission as the defendant's agent to sell the defendant's houses. Therefore, an estate agency relationship could not be established between the plaintiffs and the defendant. The commission which was agreed to be paid to the plaintiffs was meant to encourage the plaintiffs to sell more (see paras 24–25).

(2) The defendant failed to provide any evidence to suggest that the plaintiffs had provided any professional advice or rendered any services as an estate agent. As such, the plaintiffs' work as sale and marketing personnel in a property development company could not preclude them from getting paid a commission by the Principal Act (see paras 28–29).

(3) The intention of Parliament was to regulate individuals acting as real estate agents, not employees under employment of a property development company. A registered estate agent was not an employee of a company, but a free agent. An estate agent could act for as many principals as he so wishes at any given time, but an employee of a property development company could not do so (see para 32).

(4) There was documentary proof that the defendant had paid commission to its employees, including the plaintiffs, during the subsistence of their employment. This supported the plaintiffs' narratives that at one point in time an oral agreement was reached between the plaintiffs and the defendant that the plaintiffs would be paid a commission on top of their basic salary. Based on the evidence adduced at the lower court, it was highly probable that an oral agreement was indeed reached between the plaintiffs and the defendant in that the plaintiffs would be paid commission based on the sales they secured. Hence, the plaintiffs were entitled to keep the commission which they had received and also were entitled to claim for the outstanding commission (see paras 33–34).

[Bahasa Malaysia summary

Ini adalah rayuan yang difailkan oleh defendan terhadap keputusan hakim mahkamah sesyen ('HMS') yang membenarkan tuntutan plaintif. Defendan adalah syarikat pembangunan hartanah. Defendan menawarkan pekerjaan kepada plaintif sebagai eksekutif penjualan dan pemasaran di syarikat defendan. Plaintif menegaskan bahawa terdapat perjanjian lisan yang dimasuki antara plaintif dan wakil defendan. Perjanjian lisan tersebut adalah bahawa plaintif akan dibayar komisen untuk rumah yang mereka jual sebagai tambahan kepada gaji bulanan asas mereka. Semasa tempoh pekerjaan mereka, plaintif menjual banyak unit rumah dalam sebuah projek yang dikenali sebagai D' Carlton Seaview Residences ('projek tersebut'). Plaintif mendakwa terhadap defendan untuk, antara lain, komisen tertunggak yang diperolehi dalam penjualan rumah defendan dalam projek tersebut. Defendan berpendapat

bahawa plaintif tidak berhak untuk dibayar apa-apa komisen untuk menjual rumah-rumah dalam projek tersebut kerana plaintif bukan ejen hartanah berdaftar menurut Akta Penilai, Pentaksir dan Ejen Harta Tanah 1981 yang berkuatkuasa pada masa yang material ('Akta Prinsipal'). Defendan selanjutnya menegaskan bahawa jika defendan terpaksa membayar komisen untuk rumah-rumah yang dijual, ia hanya bertanggungjawab untuk membuat pembayaran kepada pihak yang dilesenkan sebagai ejen harta di bawah Akta Prinsipal, bukan plaintif. Defendan juga berpendapat bahawa plaintif adalah pekerja syarikat, dan mereka terikat dengan syarat-syarat kontrak pekerjaan, yang bermaksud bahawa plaintif hanya berhak mendapat gaji asas mereka. Defendan juga dengan tegas menafikan bahawa terdapat sebarang kontrak lisan yang dimasuki antara plaintif dan defendan. Defendan menuntut balas atas semua wang yang dibayar sebagai komisen kepada plaintif semasa pekerjaan plaintif. HMS membenarkan tuntutan plaintif dan oleh itu rayuan ini.

Diputuskan, menolak rayuan:

(1) Tiada keterangan untuk mencadangkan bahawa plaintif telah bertindak atau mengemukakan diri mereka sebagai bersedia untuk bertindak untuk komisen sebagai ejen defendan untuk menjual rumah defendan. Oleh itu, hubungan agensi harta tanah tidak dapat ditubuhkan di antara plaintif dan defendan. Suruhanjaya yang dipersetujui untuk dibayar kepada plaintif bertujuan untuk menggalakkan plaintif menjual lebih banyak (lihat perenggan 24–25).

(2) Defendan gagal memberikan sebarang keterangan untuk mencadangkan bahawa plaintif telah memberikan nasihat profesional atau memberikan apa-apa perkhidmatan sebagai ejen harta tanah. Oleh itu, kerja plaintif sebagai pekerja jualan dan pemasaran dalam syarikat pembangunan hartanah tidak dapat menghalang mereka daripada dibayar komisen oleh Akta Prinsipal (lihat perenggan 28–29).

(3) Hasrat Parlimen adalah untuk mengawal selia individu yang bertindak sebagai ejen hartanah, bukan pekerja di bawah pekerjaan syarikat pembangunan hartanah. Ejen hartanah berdaftar bukanlah pekerja sebuah syarikat, tetapi ejen bebas. Seorang ejen hartanah boleh bertindak dengan sebanyak mana majikan seperti yang dia kehendaki pada masa yang tertentu, tetapi seorang pekerja syarikat pembangunan hartanah tidak boleh melakukan sedemikian (lihat perenggan 32).

(4) Terdapat bukti dokumentari bahawa defendan telah membayar komisyen kepada pekerjanya, termasuk plaintif, semasa pekerjaan mereka. Ini menyokong naratif plaintif bahawa pada satu ketika, perjanjian lisan dicapai antara plaintif dan defendan bahawa plaintif akan dibayar komisen di atas gaji asas mereka. Berdasarkan keterangan yang dikemukakan di mahkamah rendah, kemungkinan besar perjanjian lisan

A adalah dicapai antara plaintif dan defendan kerana plaintif akan dibayar komisyen berdasarkan penjualan yang mereka lakukan. Oleh itu, plaintif berhak untuk memegang komisen yang mereka terima dan juga berhak menuntut komisen tertunggak (lihat perenggan 33–34).]

B **Notes**

For cases on claims, see 3(3) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 4461–4484.

Cases referred to

C *Matad Sdn Bhd v Ng Chee Keong* [2004] 2 CLJ 99, CA (refd)

Legislation referred to

Valuers, Appraisers and Estate Agents Act 1981 ss 2, 22B(1), 22C, Part III

D *G Ravi (Aida Hassan with him) (G Ravi) for the appellant.*
KS Pang (KS Pang & Co) for the respondents.

Choo Kah Sing J:

E INTRODUCTION

[1] The reference to the parties in this judgment will be based on their original positions at the Sessions Court, Johor Bahru.

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[2] This is an appeal filed by the defendant against the decision of the sessions court judge ('SCJ') allowing the plaintiffs' claims. The plaintiffs claimed against the defendant for, inter alia, outstanding commission earned in the sales of the defendant's houses in a project known as 'D' Carlton Seaview
G Residences' ('the project').

[3] The defendant contended that the plaintiffs, who were employees of the defendant company, were not entitled to be paid any commission for the sales of the defendant's houses because it was against the law.

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[4] On 14 November 2018, this court, after having heard and read the parties' counsels' submissions, dismissed the defendant's appeal. The reasons for the decision of this court are set down as below.

I BACKGROUND FACTS

[5] The defendant is a property development company. On 1 April 2012, the defendant offered the plaintiffs employment as 'Sale and Marketing Executive' in the defendant company. The contract of employment stated that

the plaintiffs would be paid a basic salary of RM1,500 per month respectively. Three months later, the probation period ended. On 1 July 2012, the defendant confirmed the plaintiffs' employment. Thereafter, the plaintiffs became permanent employees of the defendant company.

[6] The plaintiffs averred that there was an oral agreement entered into between the plaintiffs and the defendant's representative. The oral agreement was that the plaintiffs would be paid a commission for the houses they sold in addition to their basic monthly salary.

[7] In the course of their employment, the plaintiffs sold many units of the houses in the project. The first plaintiff and second plaintiff received RM164,077.83 and RM150,076.62 respectively from the defendant as their commission earned for selling the houses in the said project for the period between August 2012 and May 2013.

[8] The first plaintiff and second plaintiff averred the sums of RM440,756.37 and RM373,823.36 respectively were outstanding and not paid to them respectively as their entitlement for the commission earned for the sales of the houses in the said project.

[9] The defendant contended that the plaintiffs were not entitled to be paid any commission for selling the houses in the project. This is because the plaintiffs were not registered estate agents pursuant to the Valuers, Appraisers and Estate Agents Act 1981 in force at the material time ('the Principal Act'). The defendant further contended that if the defendant had to pay commission for the houses sold, it was only liable to make the payment to a party licensed as an estate agent under the Principal Act, not the plaintiffs.

[10] The defendant also contended that the plaintiffs were employees of the company, and that they were bound by the terms of the employment contract, which meant the plaintiffs were entitled only to their basic salary. The defendant also vehemently denied that there was any oral contract entered into between the plaintiffs and defendant. Hence, the defendant refuted the plaintiffs' claims. The defendant counterclaimed for all the money paid as commission to the plaintiffs during the subsistence of the plaintiffs' employment.

FINDINGS OF THIS COURT

[11] The Principal Act has been amended by the Valuers Appraisers and Estate Agents (Amendment) Act 2017 (Act A1550). The amendment came to force on 2 January 2018. At present, the long title of the Principal Act is known as Valuers, Appraisers, Estate Agents and Property Managers Act 1981.

[12] For this appeal, the action was first filed in the sessions court in March 2016, therefore, the provisions of the Principal Act before the amendment are still relevant and applicable in this appeal.

[13] In the memorandum of appeal, the defendant raised several grounds of appeal. However, the defendant's counsel confined his appeal to only one ground during the hearing proper.

[14] The defendant's counsel submitted that the plaintiffs could not claim any commission from the defendant company for the sales of the houses in the project because the plaintiffs were not registered estate agents under the Principal Act. Based on the Principal Act, only a registered estate agent is entitled to recover commission for a sale of immovable property, the defendant's counsel submitted.

[15] The defendant's sole ground of appeal calls upon this court to examine whether in the given circumstances of this case would invoke the applicability of the Principal Act. In other words, whether an employee employed in a property development company to sell and market properties for the company falls within the meaning of an 'estate agent' as envisaged by the Principal Act.

[16] The defendant relied on s 22C of the Principal Act (prior to the amendment) in support of its appeal. The defendant's counsel submitted that the plaintiffs had provided *professional advice or services* in the course of their employment, and therefore, the plaintiffs were considered as an 'estate agent' according to the Principal Act.

[17] The defendant's counsel further submitted that since the plaintiffs were not registered estate agents, they were not entitled to recover any commission based on s 22C of the Principal Act. Prior to the amendment, s 22C read as follows:

> (1) No person shall *unless he is a registered estate agent* and has been issued with an authority to practise under section 16 —
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> (a) *practise* or carry on business or take up employment under any name, style or title containing the words 'Estate Agent', 'House Agent', 'Property Agent', 'Land Agent', 'House Broker', or the equivalent thereto, in any language or bearing any other word whatsoever in any language which *may reasonably be construed to imply that he is a registered estate agent* or *that he is engaged in estate agency practice* or business;
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> (aa) carry on business or *take up employment as an estate agent*;
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> (b) display any signboard or poster or use, distribute or circulate any card, letter, pamphlet, leaflet, notice or any form of advertisement, implying either directly

or indirectly that he is a registered estate agent or that he is engaged in estate agency practice or business;

(ba) offer for sale, rent or lease or invite offers to purchase, rent or lease any land, building and any interest therein irrespective of whether such land, building and interest is located within Malaysia or outside Malaysia:

Provided that where foreign properties are to be marketed in Malaysia, such offer or invitation shall be made by or through an estate agent practising and residing in Malaysia on behalf of a principal or an estate agent practicing or residing outside Malaysia;

(c) undertake any of the work specified in section 22B; or

(d) *be entitled to recover in any court any fees, commissions, charges or remuneration for any professional advice or services rendered as an estate agent.*

(2) Notwithstanding subsection (1) —

(a) ...;

(b) ...; and

(c) ...;

commission, fee, reward or other consideration, may sell, purchae or rent, or offer to sell, purchase or rent, such land, building and interest.

(3) The provisions relating to estate agency practice in subsections (1) and (2) shall apply mutatis mutandis to a firm.

[18] Section 22B(1) of the Principal Act reads as follows:

Subject to the provisions of this Act, a *registered estate agent* who has been issued with an authority to practice by the Board shall be entitled to practise his profession and shall be authorized to *undertake estate agency practice*.

[19] Section 2 of the Principal Act defined 'estate agency practice' and 'registered estate agent' as follows:

'estate agency practice' means *acting* or *holding oneself out to the public* or *to any individual* or firm *as ready to act, for a commission, fee, reward or other consideration, as an agent in respect of the sale or other disposal of land and buildings* and of any interest therein or the purchase or other acquisition of land and buildings and of any interest therein or in respect of the leasing or letting of land and buildings and of any interest therein including the act of making known of the availability of land, building or any interest therein for such sale or other disposal, purchase or other acquisition, leasing or letting;

[Note: the definition 'estate agency practice' has been removed/deleted by s 4 of Valuers, Appraisers and Estate Agents (Amendment) Act 2017]

'registered estate agent' means a person whose name has been entered under Part III of the Register and to whom an authority to practice has been issued by the Board under section 16.

[20] The law explicitly states that only a registered estate agent can practise as an estate agent and to carry on an estate agency practice for a fee, commission, reward, charges, remuneration or other considerations.

[21] In *Matad Sdn Bhd v Ng Chee Keong* [2004] 2 CLJ 99 at p 105, the Court of Appeal held that the word 'acting' in s 2 must be read in the context of s 22C. It was further held that 'the Act requires an estate agency relationship to exist between the parties. In the absence of such a relationship the Act had no application. Whether such a relationship exists in a given case is a question of fact depending upon the facts and circumstances of each case'. The Court of Appeal found in favour of the High Court's decision in that the plaintiff was not qualified as a person registered under Part III of the Act, and that the plaintiff only had knowledge in respect of the existence of the land for sale and that he was only capable to find a prospective purchaser in contact with the seller. Hence, the Court of Appeal held that the plaintiff was not a person who had given professional advice or professional services to the defendants as an estate agent.

[22] Based on the Court of Appeal's reasoning in *Matad Sdn Bhd*, the legal propositions could be surmised that, firstly, the Act applies only to an estate agency relationship. Secondly, whether an estate agency relationship existed or otherwise will wholly depend on the circumstances of the fact, ie case to case basis. Thirdly, the court must adopt a contextual approach in the construction of s 22C of the Principal Act.

[23] Based on the above propositions, it is pertinent for this court to ask: *whether the plaintiffs had acted or held themselves to the defendant as ready to act for a commission as its agent, and that the plaintiffs had given professional advice or services rendered as estate agents to the defendant, despite being employed by the defendant company as employees?*

[24] Based on the facts and documentary evidence, the relationship between the defendant and the plaintiffs was none other than as employer and employee. This fact was not in dispute. There was not a shred of evidence to suggest that the plaintiffs had acted or held themselves out as ready to act for a commission as the defendant's agent to sell the defendant's houses. The evidence before the court was that the commission was paid as part of the plaintiffs' earnings, in addition to their basic salary. The commission was paid not on the basis as an agent's fees or remuneration. In the absence of any evidence to suggest the plaintiffs had acted or held themselves out as ready to act for a commission as the defendant's agent, therefore, an estate agency relationship could not be established between the plaintiffs and the defendant.

[25] It is a common practice that employees will be remunerated by commission, on top of their basic salary, in the sale and marketing industry. This sort of 'commission' is a remuneration and an incentive scheme to encourage employees to work hard. In the present case, the commission which was agreed to be paid to the plaintiffs was no different. It was meant to encourage the plaintiffs to sell more.

[26] From the facts, the plaintiffs' job scope was to sell houses. On the surface, their role appear to be similar to an estate agent's, ie selling real estate properties, but, the plaintiffs' duties were far from being an estate agent.

[27] The plaintiffs did not practise under any name, style or title carrying the words 'estate agent' nor did they carry on a business or take up employment as an estate agent with the defendant company. They merely took up an employment as a 'Sale and Marketing Executive' in the defendant company. They did not represent themselves to the defendant at any material time as an estate agent.

[28] With regard to the issue whether the plaintiffs had provided any professional advice or rendered any services as an estate agent to the defendant company, the defendant failed to provide any evidence to suggest that the plaintiffs had provided any professional advice or rendered any services as an estate agent.

[29] The plaintiffs acted under the defendant's instructions during their employment. The plaintiffs carried out their duties as per their job scope in the employment. As such, the plaintiffs' work as sale and marketing personnel in a property development company could not preclude them from getting paid a commission by the Principal Act.

[30] It could not be the intention of Parliament to oblige a sale and marketing personnel in a property development company to register as a licensed estate agent in order to receive commission from the sales of the products of a property development company.

[31] In the event a property development company offered to pay commission to its sale and marketing staff, such an offer could only be encompassed by the employment contract, not an estate agency relationship.

[32] Reading s 22C in its contextual sense and applying the law in the circumstances of this case, this court is of the considered view that the present facts could hardly square with what the law intended. The intention of Parliament is to regulate individuals acting as real estate agents, not employees under employment of a property development company. A registered estate

agent is not an employee of a company, but a free agent. An estate agent can act for as many principals as he so wishes at any given time, but an employee of a property development company cannot do so.

[33] With regard to the defendant's counterclaim for the refund of money paid to the plaintiffs, there is documentary proof that the defendant had paid commission to its employees, including the plaintiffs, during the subsistence of their employment. The commission was paid monthly, and it was based on the sales secured by each individual employee, presumably the marketing team. This fact supported the plaintiffs' narratives that at one point in time an oral agreement was reached between the plaintiffs and the defendant that the plaintiffs would be paid a commission on top of their basic salary.

[34] This court is of the considered view that based on the evidence adduced at the lower court, it is highly probable that an oral agreement was indeed reached between the plaintiffs and the defendant in that the plaintiffs would be paid commission based on the sales they secured. Hence, the plaintiffs were entitled to keep the commission which they had received and also are entitled to claim for the outstanding commission.

[35] The SCJ has made a finding of fact that the amounts claimed by the plaintiffs are correct and proved. Hence, there is no reason for this court to disturb the finding of fact of the SCJ.

CONCLUSION

[36] Based on the above reasoning, this court dismissed the defendant's appeal and ordered the defendant to pay costs of RM2,000 to the plaintiffs.

Appeal dismissed.

Reported by Nabilah Syahida Abdullah Salleh